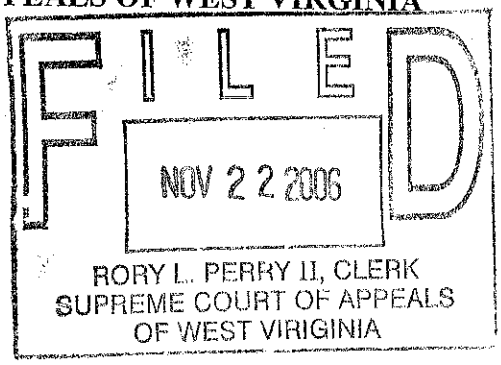
NO. 33037

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA




STATE OF WEST VIRGINIA,

*Appellee,*

v.

VALERIE WHITTAKER,

*Appellant.*

# BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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## I.

## STATEMENT OF THE CASE

This is an appeal by Valerie Whittaker ("Appellant") from her jury conviction of voluntary manslaughter in the Circuit Court of Mercer County, the Honorable John R. Frazier presiding.

## II.

## STATEMENT OF FACTS

### A. FACTUAL HISTORY.

It was no accident Appellant met Mr. Mills on June 25, 2003–she *knew* they both had doctor's appointments,[1] but chose to leave her aunt's house anyway, rather than reschedule or bring anyone else with her besides her daughter, Jacqueline.

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[1]Trial Transcript ("Tr.") 391.

First, she had been staying at Pam's Place, a domestic violence shelter, and although Appellant and her daughter had stayed previously for fifteen months,[2] this time she felt the need to stay but five days, claiming "you're only allowed to stay there for like five days."[3] It was also no accident Mr. Mills knew about the domestic violence petition ("DVP") Appellant filed against him (but was never served), for she was the one who called Carolyn Duncan during her stay at the shelter to warn him about it because she knew he would not want to lose his right to go hunting.[4]

From Pam's Place, Appellant went to her aunt's, Debra Fowler, before going alone to Doctor Brooks' office on that fateful day. And then, having met the deceased, the three were in separate cars–Appellant and her daughter in one vehicle, while Mr. Mills was in another.[5] From the doctor's office, the trio stopped at a pharmacy,[6] Appellant stopped for gas, and then Mr. Mills pulled off the side of the road to talk with someone while Appellant kept driving.[7] At no time did Appellant attempt to leave him or to obtain help.

Upon reaching the trailer the first time, the three got into one car and went to a friend's house, Jim Duncan's, where they visited for over an hour before stopping at a convenience store on the way back home.[8] Again, Appellant made no attempt to leave Mr. Mills.

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[2]Tr. 604-05.

[3]Tr. 386.

[4]Tr. 386.

[5]Tr. 392.

[6]Tr. 393

[7]Tr. 394.

[8]Tr. 396-98.

Back at the trailer, the arguing and violence escalated until finally Appellant reached into a cabinet, pulled out a revolver, and shot and killed Mr. Mills.[9] It was then the lies began.

Appellant called 911, met the police at M & M Grocery, and rode in the police cruiser back to the scene of the crime, telling Trooper Christian a story of self-defense–how Mr. Mills was armed with a shotgun and she was simply defending herself. However, when they reached the crime scene Trooper Christian observed discrepancies in what Appellant had told him, including "bloody footprints," and "the hand on the trigger."[10] Then, after Trooper Christian and Appellant returned to the station, she eventually confessed to another police officer that

> in order for it to appear that he had threatened her life and her daughter's life that she went in a back bedroom and got a single barrel Polk stock shotgun, brought it out to where he was laying on the floor, placed the gun beside him and put his finger to where it was locked around the trigger.[11]

## B. PROCEDURAL HISTORY.

In February 2004, the Grand Jury for Mercer County, West Virginia, returned a one-count indictment charging Appellant with "Murder-First Degree."[12]

Following a three-day trial, the jury found Appellant guilty of voluntary manslaughter.[13]

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[9]Tr. 401.

[10]Tr. 326.

[11]Tr. 275-76.

[12]Record ("R.") 1.

[13]R. 103.

The circuit court subsequently sentenced Appellant to a determinate term of ten years, with credit for time served in the amount of 524 days. The circuit court also recommended Appellant be "placed in a minimum to medium secured facility."[14]

It is from this conviction and sentence that Appellant brings her appeal.

## III.

## ASSIGNMENTS OF ERROR

Appellant assigns the following grounds as error:

A. The trial court erred in failing to direct the verdict for the defense on the basis of self defense.[15]

B. The trial court abused its discretion in limiting the testimony of Erma Jean Hudgins.[16]

C. The trial court erred in limiting the testimony of Sandra Brinkley.[17]

D. The trial court abused its discretion in limiting the testimony of Deborah Fowler.[18]

E. The trial court abused its discretion in ruling the deceased cockfighting paraphernalia inadmissible.[19]

F. The trial court erred in admitting certain statements allegedly made by Appellant.[20]

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[14]R. 163-65.

[15]Brief, p. 7.

[16]Brief, p. 10.

[17]Brief, p. 12.

[18]Brief, p. 13.

[19]Brief, p. 14.

[20]Brief, p. 15.

## IV.

## ARGUMENT

### A. THE CIRCUIT COURT DID NOT ERR BY FAILING TO DIRECT THE VERDICT ON THE BASIS OF SELF-DEFENSE, BECAUSE THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT OF VOLUNTARY MANSLAUGHTER.

#### 1. The Standard of Review.

> " ' "Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt." *State v. West*, 153 W. Va. 325, 168 S.E.2d 716 (1969).' Syl. pt. 1, *State v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974)." Syl. Pt. 10, *State v. Davis,* 176 W. Va. 454, 345 S.E.2d 549 (1986).[21]

#### 2. Discussion.

Appellant's complains that the "Court erred in failing to direct the verdict for the defense on the basis of self defense."[22] Concomitant with that issue, and embedded therein, is a sufficiency argument. As will be shown below, the circuit court did not commit reversible error in denying Appellant's motion, because not only was there substantial evidence to support the jury's verdict of voluntary manslaughter, but the circuit court gave a number of instructions that benefitted Appellant and her self-defense theory.

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[21]Syl. Pt. 1, *State v. Rogers*, 209 W. Va. 348, 547 S.E.2d 910 (2001).

[22]Appellant's Brief, p. 7.

At the Motion for a New Trial and Sentencing Hearing, Appellant essentially argued "the evidence demonstrated self-defense as a matter of law."[23] The State's argument in response was precise and accurate:

> With the second argument that he had that the evidence was contrary–or the jury's verdict was contrary to–to the law, Your Honor that's a question of fact for the jury. There was twelve people that sat on that jury and decided beyond a reasonable doubt that the Defendant was not acting in self-defense at the time that she killed Jerry Calvin Mills[.][24]

Indeed, the prosecutor's argument is well-grounded in case law, too, which directly correlates to Appellant's sufficiency argument.

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.
>
> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.[25]

Ultimately, the circuit court correctly and unerringly ruled as follows:

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[23]Sentencing Hearing, p. 4.

[24]Sentencing Hearing, p. 6.

[25]Syl. Pts. 1 and 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

> [W]hether there was self-defense as a matter of law, I don't believe that under the evidence of this case that this was a matter for the Court to decide but–but for the jury. I think both sides presented evidence to support their positions that this was a premeditated–from the State's standpoint a premeditated and malicious killing, and from the Defendant's standpoint that this was a killing based upon self-defense for herself or her child. *I think the matter was clearly a question for the jury and was–was resolved by the jury and, certainly, the Court should not interfere with the jury's verdict on that issue.*[26]

When viewing the evidence in a light more favorable to the prosecution, there is certainly substantial evidence upon which the jury could have justifiably found Appellant guilty of voluntary manslaughter beyond a reasonable doubt. Most importantly, is the fact that Appellant shot and killed Mr. Mills. And then Appellant finally confessed that

> in order for it to appear that he had threatened her life and her daughter's life that she went in a back bedroom and got a single barrel Polk stock shotgun, brought it out to where he was laying on the floor, placed the gun beside him and put his finger to where it was locked around the trigger.[27]

But before she killed him, before Appellant and Mr. Mills returned to the trailer the second time on that fateful day, Appellant did have opportunities to leave him–even though they may have carried risk, as Appellant stated in her testimony. After first having met him at the doctor's office, Appellant and Mr. Mills were in separate cars. It was *possible*, at that point, for her to leave–go in another direction or speed away–rather than follow, as she did not know whether Mr. Mills was armed, as she says he may have been.[28] After stopping at a pharmacy, Appellant explained she

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[26]Sentencing Hearing, p. 6.

[27]Tr. 275-76.

[28]Tr. 392-93.

needed gas. After getting it, her daughter wanted something inside the convenience store. Here, she could have explained her situation or even used the telephone and called for help. But she did not.[29]

Afterwards, Appellant had yet another opportunity to leave, but chose not to. Mr. Mills pulled in front of Appellant (the two were still in separate cars) and stopped to talk to someone. There was some time when Appellant was apparently out of sight of Mr. Mills, where she could have gotten away–*if* she had been willing to take the risk.[30] Later, after stopping at the trailer, the three, Appellant, Mr. Mills, and Jacqueline, went to the home of a friend, Jim Duncan, for a visit. Again, she *could* have told Mr. Duncan what was happening or put Jacqueline in the car and sped away.[31] Because the three were traveling together, and went directly back to the trailer from Mr. Duncan's, there really were no more opportunities for Appellant to leave with her daughter. The State acknowledges the difficulty in making hard or risky decisions, but it also recognizes that Appellant ended up killing Mr. Mills because she did not take one of those risks before returning to the trailer.

Inside the trailer, the violence eventually escalated until Appellant shot and killed Mr. Mills. The domestic violence petition Appellant puts so much emphasis on may show evidence of the deceased's violent tendencies, but it was still never served. It did not exonerate Appellant of her actions; it was simply another piece of evidence the jury heard and considered during its deliberations. Besides the fact that Appellant killed Mr. Mills, the most telling evidence in support of the jury's verdict is that she actually stepped through Mr. Mills' blood to retrieve a shotgun and

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[29]Tr. 393-94.

[30]Tr. 394.

[31]Tr. 395-96.

place it in his hand[32]–all in an attempt to make the killing look like self-defense. That is, she lied to the police–at least initially–and even told the jury it was her daughter who gave her the idea to put the shotgun in his hands.[33]

When making its decision to convict Appellant, the jury also considered the credibility of *all* the witnesses–including the fact that Appellant initially lied to police and the inconsistent testimony of her daughter by closed circuit television, who apparently remembered everything on direct, but almost nothing on cross-examination. "Credibility determinations are for a jury and not an appellate court."[34]

Besides the evidence, the circuit court gave three instructions benefitting Appellant and her theory of self-defense. The circuit court not only instructed the jury on "self-defense,"[35] including the State's obligation to disprove self-defense beyond a reasonable doubt, but it also gave instructions regarding "no duty to retreat or flee from her kitchen,"[36] and "battered spouse syndrome."[37]

With all of the evidence and instructions before it, the jury ultimately convicted Appellant of *voluntary manslaughter*, rather than first degree murder.[38] This indicates the jury found that

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[32]Tr. 299-300.

[33]Tr. 413-14.

[34]Syl. Pt. 3, in part, *Guthrie, supra.*

[35]R. 113.

[36]R. 116.

[37]R. 117.

[38]R. 103.

Appellant acted intentionally, out of sudden excitement and heat of passion, but without malice, deliberation, or premeditation.

With this evidence, a rational jury could have found that the State proved beyond a reasonable doubt that Appellant was guilty of voluntary manslaughter. Based upon the foregoing evidence and testimony presented, it cannot be said that "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt."[39]

Therefore, for the reasons stated above and in the record, not only because was there was substantial evidence to support the jury's verdict, but the circuit court gave a number of instructions that benefitted Appellant's self-defense theory, this Court should find the circuit court did not commit reversible error in refusing to direct a verdict on the basis of self-defense.

## B. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY LIMITING THE TESTIMONY OF ERMA JEAN HUDGINS, SANDRA BRINKLEY, OR DEBRA FOWLER, BECAUSE IT WAS PURE HEARSAY.

### 1. The Standard of Review.

First, an interpretation of the West Virginia Rules of Evidence presents a question of law subject to de novo review. Second, *a trial court's ruling on the admissibility of testimony is reviewed for an abuse of discretion*, "but to the extent the [circuit] court's ruling turns on an interpretation of a [West Virginia] Rule of Evidence our review is plenary."[40]

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[39]Syl. Pt. 3, *in part*, *Guthrie*.

[40]*State v. Sutphin*, 195 W. Va. 551, 560, 466 S.E.2d 402, 411 (1995) (citations omitted) (alterations in original) (emphasis added).

2. **Discussion.**

Appellant asserts the circuit court erred in limiting the testimony of three defense witnesses: Erma Jean Hudgins, Sandra Brinkley, and Deborah Fowler.[41] However, because the circuit court properly limited the excluded testimony of the three witnesses as hearsay, it did not abuse its discretion.

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[42]

More specifically, Appellant complains the excluded testimony of the witnesses should have fallen under a number of exceptions to the hearsay rule: present sense impression, excited utterance, or state of mind; or that the testimony constituted either a "verbal act" or *res gestae*. But none of this applies, because the proffered testimony was not offered to show the specific actions of Appellant, but rather to show the truth of the matter asserted–that the decedent, Mr. Mills, had previously threatened or abused Appellant.

Erma Jean Hudgins testified as to Appellant's "state of mind"[43] at trial. She testified that Appellant came to her church fearful about five times in a year and a half, [44] that her daughter was with her and she was afraid,[45] and they were crying.[46] It was only when Ms. Hudgins' testimony

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[41]Appellant's Brief, pp. 10, 12, and 13.

[42]W. Va. R. Evid. 801(c).

[43]W. Va. R. Evid. 803(3).

[44]Tr. 428.

[45]Tr. 429.

[46]Tr. 428, 430-31.

concerned statements Appellant *told* her that the circuit court properly excluded it: "she said well my husband–. . . .–has threatened me, he's gonna kill me." Later, when Ms. Hudgins began to testify as to what Appellant *told* her, the circuit court reminded her: "–don't say anything about what [Appellant] said."[47]

Additionally, Ms. Hudgins' proffered testimony, the taped telephone conversation,[48] is replete with statements Appellant *told* her concerning Mr. Mills' behavior. Ms. Hudgins recalled Appellant telling her Mr. Mills had abused her or her daughter, but she never witnessed any physical signs of abuse herself.[49] Appellant also told her that Mr. Mills would beat her and threaten her, even limit her finances, but again, Ms. Hudgins never witnessed any of these acts herself–she only knew what Appellant *told* her.[50]

At the *in camera* hearing, Sandra Brinkley testified she never witnessed any violence between Appellant and Mr. Mills.[51] Ms. Brinkley did see bruises on Appellant, but that was ten years prior to the killing.[52] Ms. Brinkley also testified as to more recent events, including Appellant's fearful demeanor,[53] and *why* Appellant left to go to Pam's Place (a domestic violence shelter)–because of

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[47]Tr. 430.

[48]Tr .431-33.

[49]Tr. 431-33

[50]Tr. 431-433

[51]Tr. 474.

[52]*Id.*

[53]Tr. 476.

Mr. Mills' actions, which Ms. Brinkley did not witness but only heard from Appellant.[54] The circuit court ruled that her testimony would be limited as to hearsay, and told Ms. Brinkley to return the next day. Appellant never called her to the stand.

The bulk of Debra Fowler's proffered testimony also includes pure hearsay. "[Appellant] said she needed a place to stay because she was afraid Calvin was gonna hurt her."[55] "[Appellant] said that he had threatened 'em."[56] Again, Ms. Fowler never witnessed any of these acts. But at trial, Ms. Fowler properly testified as to Appellant's "state of mind" or demeanor: "she was very nervous," and "she was afraid."[57] Ms. Fowler also testified that Appellant left Pam's Place to stay at hers, and described how many times Mr. Mills called there looking for Appellant.[58] But again, the circuit court properly limited her testimony as to hearsay.

First, the proffered testimony was not admissible as a present sense impression,[59] because none of it related to the time of the killing. Neither was it admissible as an excited utterance[60] for the same reason. Furthermore, the testimony limited by the circuit court was not admissible under the state of mind[61] exception. Appellant had multiple opportunities to put her state of mind into

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[54]Tr. 475.

[55]Tr. 478.

[56]Tr. 479.

[57]Tr. 590.

[58]Tr. 589-91.

[59]W. Va. R. Evid. 803(1).

[60]W. Va. R. Evid. 803(2).

[61]W. Va. R. Evid. 803(3).

evidence–and did–through these witnesses. She was fearful, nervous–they were simply not permitted to say *why* she was so, because that would be hearsay in its purest form.

Second, the proffered testimony of the three witnesses is neither a verbal act[62] nor *res gestae*,[63] as these statements of Appellant were not part of the events in question, and thus not original evidence. The testimony is not a verbal act because Appellant was not attempting to prove simply that the statements were made, but *why* she had made them–that she was afraid of Mr. Mills or to show that Mr. Mills was the aggressor. The proffered testimony was too remote in time to be considered *res gestae*, and did not concern the killing itself. The excluded testimony simply dealt with what Appellant *told* the various witnesses as to *why* she was afraid, *why* she left Mr. Mills, and how aggressive he was toward her.

Appellant did not need these hearsay statements to explain her actions. She had already testified to these and other events herself. In addition, Appellant had other witnesses with personal knowledge of her problems with the deceased.

A neighbor, Michael Starkey, also testified that he witnessed at least one "physical confrontation," and Appellant would seem "very sad" whenever she would hear Mr. Mills.[64] David Brunk, another neighbor, testified how he had heard through his family how Mr. Mills believed he was having an affair with Appellant, that she was on a tight timeline–always having to be back in

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[62]*See* 2, Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, § 8-2(B)(1), 130 (3d ed. 1994).

[63]*See* Cleckley, *supra*, at § 8-2(B)(2).

[64]Tr. 435-37.

the house, and seeing bruises on her.[65] David King testified he heard the two arguing–yelling–at each other, that he heard gunshots coming from their house, and that he saw Appellant wear sunglasses when it was cloudy outside.[66]

Appellant put on David A. Clayman, Ph.D., who testified regarding battered woman's syndrome. Ultimately, he concluded, "[Appellant] was in a situation that fits the prototypical description of a battered woman."[67] Barbara Hawkins, a volunteer and board liaison for Pam's Place, also explained that it was a safe haven for women like Appellant. She described Appellant's appearance when she arrived at the shelter and how she had stayed there more than once.[68] The circuit court further gave the defense instruction regarding battered woman's syndrome in its charge to the jury.[69]

Furthermore, at no time did the State challenge Appellant's claims of abuse at the hands of Mr. Mills–there simply were no accusations of recent fabrication. Certainly, the State did bring out the fact that Appellant initially lied about Mr. Mills having a shotgun in his hand–which he did not. However, the prosecutor never suggested that she lied about the abuse. In fact, it was the State that elicited testimony that she remained in the relationship for over ten years and filed four domestic violence petitions[70]–classic signs of battered woman's syndrome.

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[65]Tr. 443-45.

[66]Tr. 461-62.

[67]Tr. 560.

[68]Tr. 604-14.

[69]R. 117.

[70]Tr. 409.

Lastly, Appellant suffered no prejudice when the circuit court limited the testimony of the three witnesses, because Appellant took the stand and testified to the patterns of abuse, the aggressive demeanor of Mr. Mills, and how she feared him. She also had multiple witnesses to corroborate her testimony, and a jury instruction to support her theory of defense.

Therefore, for all the reasons above and in the record, this Court should hold that the circuit court did not abuse its discretion in limiting the testimony of Erma Jean Hudgins, Sandra Brinkley, or Debra Fowler on the basis of hearsay.

## C. BECAUSE THE COCKFIGHTING PARAPHERNALIA WAS DEMONSTRATIVE EVIDENCE, THE CIRCUIT COURT DID NOT ERR BY NOT PERMITTING THE EXHIBITS TO GO BACK TO THE JURY ROOM.

### 1. The Standard of Review.

> Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. *When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.* By contrast, mere forfeiture of a right–the failure to make timely assertion of the right–does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."[71]
>
> An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.[72]

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[71]Syl. Pt. 8, *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (1995) (emphasis added).

[72]Syl. Pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

> Generally, *the use of* either real or demonstrative evidence is left within the discretion of the trial court.[73]
>
> The admission of demonstrative evidence rests largely within the trial court's discretion, and an appellate court will not interfere unless the trial court has abused that discretion.[74]

**2. Discussion.**

Appellant complains "the trial court abused its discretion by not allowing the deceased cockfighting paraphernalia into evidence."[75] The entire premise of Appellant's argument is inaccurate, because the circuit court did, in fact, admit the cockfighting paraphernalia into evidence, and allow it to be exhibited to the jury. The circuit court simply did not permit the exhibit to go back into the jury room,[76] as is well within its discretion to do. But this issue should not even be before this Court, because Appellant offered the cockfighting paraphernalia as *demonstrative evidence only*, effectively waiving any future objection on this issue.[77]

The entire portion of the trial transcript that deals with the cockfighting exhibit may be found on pages 377 to 379, but the most relevant portion is as follows, which is after the testimony regarding the spurs and blades–the cockfighting exhibit–after the testimony of the deceased's interest in other blood sports.

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[73]*Runner v. Cadle Company*, 204 W. Va. 21, 22, 511 S.E.2d 132, 133 (1998) (emphasis added).

[74]Syl. Pt. 14, in part, *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995).

[75]Brief, p. 14.

[76]Tr. 379.

[77]*See infra*.

[DEFENSE COUNSEL]: At this time I'd move the introduction of Defendant's Exhibit No. 3?

THE COURT: Any objection?

[PROSECUTOR]: Only as to relevancy, Your Honor.

THE COURT: Well since it's–I'm not sending all that back to the jury,–

[DEFENSE COUNSEL]: Sure.

THE COURT: –the jury's seen this so I'm not gonna allow that–

[DEFENSE COUNSEL]: Okay.

THE COURT: –as an Exhibit to go back to them. You're not offering those trophies [(e.g., from the deceased's other hunting exploits)], or anything like that at this point?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: Thank you.

**(Defendant's Exhibit No. 3, Blue Plastic Box with cockfighting paraphernalia, introduced into evidence but not to go to jury.)**

[DEFENSE COUNSEL]: *Those were demonstrative.*[78]

The circuit court admitted the box of cockfighting paraphernalia into evidence and simply did not send it back to the jury. Appellant did not object.[79] In fact, Appellant waived any issue she may have had concerning the cockfighting paraphernalia by offering it as *demonstrative evidence*

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[78]Tr. 378-79 (emphasis added).

[79]Tr. 379.

*only*. Before a reviewing court analyzes an alleged error, it first must ask "whether there has in fact been error at all."[80]

> [D]eviation from a rule of law is error unless there is a waiver. Waiver . . . is the "intentional relinquishment or abandonment of a known right.". . . [W]hen there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law need not be determined.[81]

In *Miller*, the defendant argued, *inter alia*, that the circuit court's general charge to the jury was insufficient because no self-defense instruction was included within the court's charge to the jury. However, defense counsel did not submit a self-defense instruction when given the opportunity to do so, did not object to the circuit court's failure to include such an instruction, and explicitly stated to the judge that the defense was satisfied with the proposed instructions and had no objection to the jury charge.[82] This Court rejected Miller's insufficient jury charge claim for two reasons; more significantly, because she "waived any issues she might have had regarding an improper or insufficient jury charge" by explicitly agreeing to the proffered charge.[83]

The facts in the case *sub judice* are very similar to the facts in *Miller*. That is, in both cases, the defense intentionally relinquished a known right, and further, defense agreed with the circuit court when it stated it was not going to permit the *demonstrative* exhibit to return with the jury into the jury room. Therefore, because Appellant voluntarily waived any issue she may have had with regard to the cockfighting paraphernalia, the circuit court committed no error by not permitting the

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[80]*Miller* at 18, 459 S.E.2d at 129.

[81]*Id.* at 18, 459 S.E.2d at 129 (internal citations omitted).

[82]*Miller* at 17, 459 S.E.2d at 128.

[83]*Id.* at 19, 459 S.E.2d at 130.

exhibit to return to the jury room. Thus, this Court need not determine the effect any alleged deviation from a rule of law may have had on Appellant's proceedings.

However, should this Court decide to proceed under another analysis, the State submits it should be under a plain error analysis, rather than an abuse of discretion, in which case a similar conclusion is inevitable; that is, the circuit court did not commit "plain error that affect[ed] the substantial rights of [the] defendant."[84]

Because Appellant offered the cockfighting paraphernalia as *demonstrative evidence only*; this meant the *use* of the exhibit, as well its admission, was within the discretion of the circuit court.[85] The jury had already seen the items within the *demonstrative* exhibit and heard testimony about the deadly nature and razor-sharp quality of the artifacts; certainly the dangerous qualities of the weaponry was but one of the factors the circuit court took into account when exercising its discretion in not permitting the box of blades and spurs to return to the jury room. This ruling by the circuit court did not affect Appellant's "substantial rights," nor did it "skew[] the fundamental fairness or basic integrity of the proceedings in some major respect."[86]

As this Court held in *LaRock*:

> The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.[87]

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[84]*Id.* at 18, 459 S.E.2d at 129.

[85]*See Rumner v. Cadle Company*, *supra*, and Syl. Pt. 14, *in part*, *Bradshaw*, *supra.*

[86]Syl. Pt. 7, *in part, LaRock, supra.*

[87]*Id.*

Therefore, for the reasons stated above and in the record, this Court should hold Appellant waived the issue regarding the cockfighting exhibits, and thus find there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. In the alternative, this Court should hold that because the cockfighting paraphernalia was demonstrative evidence, the circuit court did not err by not permitting the exhibits to go back to the jury room.

## D. THE CIRCUIT COURT DID NOT ERR BY ADMITTING EITHER APPELLANT'S FIRST STATEMENT TO TROOPER CHRISTIAN OR BY ADMITTING HER STATEMENT TO SERGEANT MANKINS.

### 1. The Standards of Review.

1. " ' "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syllabus Point 3, *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978).' Syl. pt. 7, *State v. Hickman*, 175 W. Va. 709, 338 S.E.2d 188 (1985)." Syllabus Point 2, *State v. Stewart*, 180 W. Va. 173, 375 S.E.2d 805 (1988).[88]

2. This Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.[89]

3. In circumstances where a trial court admits a confession without making specific findings as to the totality of the circumstances, the admission of the confession will nevertheless be upheld on appeal, but only if a reasonable review of the evidence clearly supports voluntariness.[90]

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[88]Syl. Pt. 1, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994).

[89]Syl. Pt. 2, *id.*

[90]Syl. Pt. 3, *id.*

2. **Discussion.**

Appellant complains the circuit court "erred in admitting certain statements allegedly by [her]."[91] Yet in the very next paragraph,

> []*Appellant concedes* that she was properly Mirandized before speaking to the officers, that she went to the barracks of her own accord, and that she was not promised or threatened into giving the statement. [Sic] Facially, *it would seem that the statements are admissible.*[92]

So what is really the issue? "[A]y, there's the rub:"[93] Appellant argues no truly discernible issue, except those perhaps best left for the Legislature. Though Appellant concedes her statements are admissible, Appellant also suggests the inquiry should not end there,[94] and further proposed a couple of other reforms,[95] among them "the mandatory tape recording of confessions [which] would act ultimately to protect officers from false allegations of misconduct, and would in all likelihood eliminate many false claims of police misconduct routinely passed on by the West Virginia Courts."[96]

But as to the issue of whether the circuit court erred in admitting two of Appellant's many statements–or rather, confessions–it most certainly did not. Not under current state law.[97]

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[91]Brief, p. 15.

[92]*Id.*

[93]William Shakespeare, Hamlet, act III, sc 1.

[94]*See* Brief, p. 15.

[95]*See* Brief, pp. 15-17.

[96]Brief, p. 17.

[97]*See* Standards of Review, *supra.*

In pretrial, suppression hearings–held over the course of two days so that the court had the opportunity to hear from *all* material witnesses[98]–the circuit court ruled under current state law that *all* of her statements to the authorities were admissible.[99]

Appellant ultimately gave five statements to various officials, not counting the initial 911 call, and Appellant is challenging two of them on appeal. With regard to the first challenged statement: the unrecorded statement Appellant gave to Trooper Christian after she had properly been *Mirandized*, the circuit court specifically ruled as follows.

> This–this–this statement when she was riding with Trooper Christian from where they had agreed to meet there at the M & M Convenient Store to the–to the home and to the crime scene, I don't believe she was in custody at that time, nevertheless if–if I'm wrong on that or if some court rules otherwise, she was given her rights. Certainly Trooper Christian testified to that, I see no reason not to accept his testimony at this point, there's been no challenge to that and it appears that that was reinforced by a later taped statement that was given an hour or hour and a half later where it referred to the fact that she had been given her rights as they rode from the Convenient Store to the–to the crime scene. And then after–at the crime scene, apparently the Trooper's car, a taped statement was taken and we have–we have that at that point. Obviously there was–it's my recollection is Trooper Christian said he gave her, her rights again, and made some reference to that in–in her taped statement so she–she was advised of her rights. Again, there's some question whether she's under arrest, I don't really think she was under arrest at that point, she wasn't in–she was in a police car where there were, I guess had the paperwork and everything, but I don't believe she was under arrest, but if she was she was clearly given her rights and–and waived those rights and gave a statement.[100]

As to the second challenged statement: the unrecorded statement Appellant made to Sergeant Mankins after she had signed a *Miranda* Rights Form, and after she had signed a release form which

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[98]*See* Suppression Hearing, May 7, 2004, p. 95.

[99]*See generally* Suppression Hearing, May 28, 2004, pp.31-33.

[100]Suppression Hearing, May 28, 2004, pp. 31-32.

*would have* allowed him to administer a polygraph test on Appellant (which he never did administer), the circuit court made the following ruling.[101]

> Later on [Appellant] went with the officers to the headquarters in Princeton. They had called the polygraph operator, Officer Mankins, and he I think stands pretty much in a position of another officer interviewing her, I think once we get to trial we're gonna have to exclude the fact that this was a polygraph and I assume both sides will probably be agreeing to that since it's not admissible, but in any event there was another interview, he–he took his time and, once again, went over her rights with her. In my opinion she waived those rights and talked to him, it was not recorded, apparently there was some notes, some reference to his notes or something, but in any event I believe it would be a issue [sic] for the jury, at that point, as to exactly what–what she said but I think that's not subject being suppressed at that point.[102]

Furthermore, the circuit court made specific findings and rulings concerning Appellant's same argument here that West Virginia should adopt larger, more encompassing procedures seen in other jurisdictions that have no controlling influence over the courts in this State.[103]

> As far as [Appellant's counsel's] argument that West Virginia should follow the English rule and the Alaska rule, and perhaps one others–one other, our State hasn't adopted that, until they do I'll certainly continue to our–our rule that there's no requirement for that. The Court will note her exceptions and objections.[104]

In the words of Appellant–because

> she was properly Mirandized before speaking to the officers, [because] she went to the barracks of her own accord, and [because] she was not promised or threatened into giving the statement[s]. *[I]t would seem that the statements are admissible.*[105]

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[101]Suppression Hearing, May 28, 2004, p. 6.

[102]Suppression Hearing, May 28, 2004, p. 32.

[103]*See generally* Brief, Issue "F."

[104]Suppression Hearing, May 28, 2004, p. 33.

[105]*Id.*

Most importantly, moreover, these two statements made by Appellant were never actually admitted during trial. They were only used by the officers in question for investigatory purposes, or at most mentioned briefly in passing.[106] No substantive information taken from Appellant was used at trial.

Therefore, for the reasons stated above and in the record, this Court should hold the circuit court did not commit error by admitting either Appellant's first statement to Trooper Christian or by admitting her statement to Sergeant Mankins.

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[106] *See* Tr. 273-80 for Sergeant Mankins' testimony; and Tr. 297, 315-16, 319-20, and 331 for Trooper Christian's testimony.

## V.

## CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, this Court should affirm the judgment of the Circuit Court of Mercer County.

Respectfully submitted,

State of West Virginia,
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By counsel

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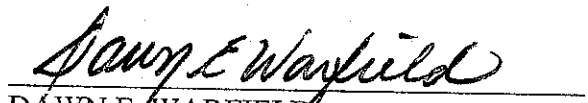

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[107]Colleen A. Ford died suddenly on November 14, 2006. This Brief was completed by her before her death, and is being filed by the undersigned counsel without revision.

## CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee State of West Virginia* was mailed to counsel for Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 22nd day of November, 2006, addressed as follows:

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